93-428 No. 93-428 (2)

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1993

SEABOURN S. LIVINGSTONE,
Petitioner,

v.

RICHARD M. DONAHEY and
PATRICIA A. DONAHEY,
Plaintiffs/Respondents

and

HELEN L. BOGLE,
Third Party Plaintiff/Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PLAINTIFFS/RESPONDENTS' BRIEF IN OPPOSITION

HERBERT G. SPARROW, III
Counsel of Record
DICKINSON, WRIGHT, MOON,
VAN DUSEN & FREEMAN
500 Woodward Ave., Suite 4000
Detroit, Michigan 48226
(313) 223-3500
Attorneys for Plaintiffs/Respondents

25 pp

QUESTIONS PRESENTED

I. May a private party who brings a contribution action to recover costs of responding to environmental contamination under Sections 107(a) and 113(f)(1) of the Comprehensive Environmental Response, Compensation And Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9613(f)(1), recover litigation costs and attorneys' fees as part of his response costs?

II. May a 100% corporate shareholder, who did not directly participate in, manage or control the waste disposal operations of the corporation, be held liable under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), as an "owner" or "operator" of a facility leased to and used by the corporation?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed, are those identified in the caption of the case, plus Defendant-Appellee St. Clair Rubber Company which, prior to 1983, was a Michigan corporation. The record of the case discloses no parent companies and no non-wholly owned subsidiaries of this Company, and Plaintiffs/Respondents know of none.

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No. 93-248

In The Supreme Court of the United States

October Term, 1993

SEABOURN S. LIVINGSTONE,
Petitioner,

v.

RICHARD M. DONAHEY and
PATRICIA A. DONAHEY,
Plaintiffs/Respondents

and

HELEN L. BOGLE,
Third Party Plaintiff/Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PLAINTIFFS/RESPONDENTS' BRIEF IN OPPOSITION

CITATIONS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Plaintiffs/Respondents agree that, so far as it goes, Petitioner's recitation of "Opinion and Orders Below" is accurate and that Petitioner's Appendix is accurate. Because absent from Petitioner's Appendix, the Trial Court's judgment dated

December 23, 1991 (together with its Order of the same date entitled "Order Modifying October 1, 1991 Findings of Fact & Conclusions of Law") are reproduced in the Appendix to this Brief beginning at p. APP-1.

JURISDICTION

Plaintiffs/Respondents agree that the jurisdiction of this Court has been properly invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651, as stated by Petitioner.

STATUTES INVOLVED

Plaintiffs/Respondents agree with Petitioner's citations to the statutes involved in connection with Petitioner's Petition. (Plaintiff/Respondent Richard Donahey's Cross-Petition, being filed contemporaneously herewith, cites and relies upon other pertinent sections of CERCLA as discussed in that Cross-Petition.)

CONCISE STATEMENT OF THE CASE

With exceptions hereafter briefly noted, Plaintiffs/Respondents accept Petitioner's Concise Statement Of The Case.

As for the corporate shareholder issue, Petitioner was not simply "the sole shareholder," nor was he in any way "a former director of the St. Clair Rubber Company," as stated in the Petition at the bottom of p. 3. Rather, Petitioner was the sole shareholder and chairman of the Board of Directors of St. Clair Rubber Company for the last twenty years of its existence. See the Trial Court Opinion at p. A-20 of the Petition. Moreover, the counsel and corporate secretary for St. Clair Rubber Company for 34 years was unchallenged in his testimony that "Mr. Livingstone [Petitioner] ran the com-

pany as a sole proprietorship. It was a corporation, but he ran it as his business." (Passage as quoted by Petitioner in his June 29, 1992, Court of Appeals Brief, at p. 28; full quotation is at p. 8 of this Brief.)

As for the attorney fee issue, the Court of Appeals did not remand for a determination of such fees "in relation to Plaintiffs' degree of success in the litigation," as asserted in the Petition in the middle of p. 8. The appropriate criteria for such determination are now subject to a present and ongoing dispute at the trial court level, where the amount of attorney fees (if any) has yet to be determined.

In fact, Petitioner and Third Party Plaintiff/Respondent Helen L. Bogle on August 30, 1993, each filed papers in the trial court reminding that court of its determination that even if attorney fees were awardable as a matter of law, they could not be awarded as a matter of fact "because the Donaheys did not itemize the various attorney fees incurred over time [and therefore] Donahey's claim for attorney fees is speculative." See Trial Court Opinion as found in Petitioner's Brief at p. A-49. These recent papers also urge the Trial Court to consider that the Court of Appeals did not specifically address the issue of sufficiency of proofs of the incurrence of attorney fees, and their amounts, and that the trial court's finding of insufficiency of such proofs had therefore been affirmed.

Although Plaintiffs/Respondents Donaheys vigorously oppose these arguments at the trial court level at this time, the ongoing nature of this dispute should be a factor in this Court's consideration of the appropriateness of granting the Petition in this case.

ARGUMENT/REASONS FOR DENYING THE WRIT

I. ATTORNEYS FEES ISSUES

A. Petition is Premature and Incomplete

Petitioner's Petition as to attorney fees should be denied. As yet, no attorney fees have been awarded. Petitioner (and Third Party Plaintiff/Respondent Helen L. Bogle) have each now urged the trial court, on remand, to deny attorney fees on the ground that the proofs as to their having been incurred by Plaintiffs/Respondents are entirely insufficient and speculative.

Acceptance of this Petition, therefore, may result in this Court's determining that fees are indeed awardable to a private party in the circumstances of this case — even as the trial court is determining that there was an absence of proofs. Plaintiffs/Respondents vigorously dispute these assertions (made in separate papers filed in the trial court by Petitioner and by Third Party Plaintiff/Respondent Bogle on August 30, 1993), and have separately suggested that the trial court might reopen the proofs if it is in any way inclined to agree with these contentions of these individuals. Nevertheless, in this state of the record, it would not appear appropriate for this Court to accept this Petition. This Court should not decide such an issue in a vacuum.

In its Opinion following trial, the trial court refused to award attorney fees both as a matter of law (Petitioner's Brief at A-46-48) but also as a matter of fact because not properly "itemize[d]" and "speculative." At A-49. Even though the Court of Appeals in part "remanded for determination of what constitutes reasonable attorneys fees recoverable under CERCLA" (at A-11), it did not specifically address the issue of sufficiency of proofs. Petitioner Livingstone and Third Party Plaintiff/Respondent Bogle have each seized on this alleged omission by the Court of Appeals, in furtherance of their claim that Plaintiff/Respondents' request for attorney

fees should be again denied by the trial court but based, this time, solely on a failure of proof.

Respondent Bogle, who would benefit from a decision by this Court that attorney fees should not be awarded, has apparently chosen not to support Petitioner's Petition.[1] Thus, Plaintiffs/Respondents respectfully suggest that if this Court were ever constrained to decide the question of awardability of attorney fees under CERCLA to a private party, it should await another case where the issue is crisply presented.[2]

B. The Issue is of Little Importance

But this Court should not address this issue at all, for it is an issue of little if any importance to the jurisprudence of the United States. This, because CERCLA is up before Congress for "reauthorization" in 1994, and the legislative process is now well under way to begin this amendatory legislation. Any division of the Circuit Courts of Appeal on this peripheral attorney fee issue is clearly a division caused, in the first

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[1] It would appear that Respondent Bogle has not met the 20-day time limit imposed by the last sentence of Rule 12.4, which "time may not be extended."

[2] Also, Petitioner's Petition is incomplete or defective because of Petitioner's failure to comply with Rule 12.4 of this Court. That rule specifies that all parties to the proceeding in the Court of Appeals "shall be deemed parties in this Court, unless the Petitioner notifies the Clerk of this Court in writing of the Petitioner's belief that one or more of the parties below has no interest in the outcome of the Petition." Here, a former Michigan corporation referred to in the Court of Appeals' Opinion as St. Clair Rubber Company, a Michigan corporation ("St. Clair"), was a Defendant-Appellee and did file a brief in that Court; further, the Court of Appeals discussed and confirmed St. Clair's liability in the matter. Petitioner's Appendix at A-7. While it is true that St. Clair's attorneys sought and were granted relief from any requirement that they appear in St. Clair's behalf at oral argument in the Court of Appeals, St. Clair may yet have some "interest in the outcome of the petition;" specifically, that part of the Petition dealing with the liability for a private party's attorney fees. Further, and in any event, no notice as required by Rule 12.4 has been served on Plaintiffs/Respondents, nor, presumably, on St. Clair Rubber Company or its attorneys.

instance, by a perceived failure of Congress to speak with crystal clarity.[3] Given these divisions in the Courts of Appeal, there can be little doubt that Congress will specifically further address the private party attorney fee issue within the next twelve months. Any decision this Court might render on the point, therefore, would as a practical matter be determinative only of this case, and perhaps a handful of other cases which may be up for decision between the time this Court speaks and Congress makes its own pronouncements in the reauthorized statute in 1994.

Even as to this case, the issue is not a matter of consequence. Plaintiffs/Respondents' overall request is for an attorney fee in a sum less than $300,000. And because the Court of Appeals agreed with the trial court that the bulk of Plaintiffs/Respondents' out-of-pocket costs would not be reimbursed to them because of their consultant's alleged failures to comply with CERCLA's National Contingency Plan, "the only recovery they have achieved is the very small amount awarded for investigative costs." At Petitioners' Brief, p. A-11. Based on this language, Petitioner and Third Party Plaintiff each are urging the trial court similarly to limit the award of attorney fees to some "very small amount."

Plaintiffs/Respondents therefore respectfully suggest that Rule 10's "special and important reasons" for granting a writ

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[3] The better-reasoned cases conclude that Congress *has* spoken with clarity when Congress, in its sweeping 1986 amendments to CERCLA, added the words "enforcement activities" to the CERCLA definition of "response," at CERCLA § 101(25). At least one court has concluded that unless "enforcement activities" includes attorney fees, the amendment was futile as it added nothing to the definition. *Hastings Building Products, Inc. v. National Aluminum Corp.*, 815 F. Supp. 228, 232 (W.D. Mich. 1993). "The American Rule [that each party bears his or her own attorney fees] does not direct a court to frustrate plain Congressional intent by quibbling over ways in which Congress could possibly have made a private party's entitlement to attorney fees more clear when language already exists in the statute establishing such an entitlement." *Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1281, 1285 (E.D. Va. 1993).

of *certiorari* on this issue are entirely absent, and that therefore the Petition should be denied.

II. CORPORATE SHAREHOLDER ISSUE

Petitioner's Petition as to his own individual liability should also be denied. Petitioner freely admits that "CERCLA itself is silent as to" Petitioner's "corporate shareholder" issue. Petition at p. 3. Thus, Petitioner must also agree, as with the attorney fee issue, that if the Court of Appeals' decision would truly "undermine the cornerstone of corporate law" (Petition at p. 8), Congress will assuredly address the point in the reauthorized statute in 1994.

Of course, the Court of Appeals' decision does no such thing. It is, rather, consistent with the decided cases and with CERCLA's broad mandate that those responsible for environmental transgressions must be held fully accountable. *Compare* cases decided under the Food, Drug And Cosmetic Act such as *U.S. v. Dotterweich*, 320 U.S. 277, 281, 88 L.Ed. 48 (1943) ("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.") and *U.S. v. Park*, 421 U.S. 658, 673–4, 44 L.Ed. 2d 489 (1975), ("[A prima facie case is established if it is shown] that the defendant had, by reason of his position in the corporation, responsibility and authority to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so").

The Petition, as submitted, mischaracterizes Petitioner as a "mere" owner of stock (Petition at pp. 3, 8) who "merely . . . had the same authority as any other majority shareholder in a corporation" (Petition at p. 7). The Petition overstates its case in declaring that Petitioner was without "direct participation in, involvement in or knowledge of the day-to-day operations of the business other than financial matters." Petition at p. 13.

Petitioner describes himself (pp. 3–4) as "the sole shareholder and a former director of the St. Clair Rubber Company." Yet the depiction of Petitioner as an innocent bystander and "former director" is incorrect; rather, he was a director of the *former* St. Clair Rubber Company (which had dissolved around 1983). See A-20. In fact, Petitioner never contested the facts that at all applicable times, over two decades, he "was the sole shareholder and chairman of the board of St. Clair, hired the presidents and appointed the members of the board of the company" and that "the presidents reported directly to Mr. Livingstone [Petitioner]." Petitioner's June 29, 1992 brief to the Court of Appeals, at pp. 28–29.

Nor is it true, as claimed, that Petitioner's "direct participation" was only as to "financial matters." In his brief to the Court of Appeals, Petitioner himself quoted the testimony of St. Clair's long-time (34 years)[1] counsel and corporate secretary as follows (Petitioner's Court of Appeals Brief at p. 28):

> "A. Well, Mr. Livingstone ran the company as a sole proprietorship. It was a corporation, but he ran it as his business. And actually he could hire and fire people as he saw fit as chairman. But Templansky [St. Clair's president] had brought up this point that he was authorized to hire people but Mr. Livingstone said he couldn't fire anybody without his approval. Mr. Templansky, as president, wanted the right to hire and fire as he saw fit as the operating man. Wood, 5/3 Tr. 93–94."

As telling as Petitioner's exercise of his "sole proprietorship" privileges, however, was his avoidance of responsibilities. For example, when asked on cross examination at trial if he was told that the city authorities had informed his company that it could no longer burn wastes behind another of its manufacturing facilities, Petitioner declared "I don't

[1] May 3, 1991 transcript, Wood, p. 34.

want to hear about that sort of thing."[5] In view of the admitted fact that the environmental catastrophe resulting from St. Clair's operations will take many hundreds of thousands of dollars to rectify (see Trial Court's Opinion at middle of Petition p. A-25), the responsibilities Petitioner avoided are every bit as important as those which he exercised. In any event, any depiction of Petitioner as a passive investor only interested in company "financial matters" is inherently incorrect.

In these circumstances, Petitioner's "I-knew-nothing-about-it" factual defenses are insufficient. *U.S.* v. *Northernaire Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987), *aff'd sub nom U.S.* v. *R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. den.* 110 S. Ct. 1527 (1990); *Kelley* v. *ARCO Industries Corp.*, 723 F. Supp. 1214 (W.D. Mich. 1989); *Kelley* v. *Thomas Solvent Co.*, 727 F. Supp. 1554, 1560–1562 (W.D. Mich. 1989); also, *Kelley* v. *Thomas Solvent*, 727 F. Supp. 1532, 1544 (W. D. Mich. 1989); *U.S.* v. *NEPACCO*, 810 F.2d 726, 743–746 (8th Cir. 1986), *cert. den.* 108 S. Ct. 146 (1987). One cannot escape CERCLA liability through deliberate or negligent ignorance of corporate waste disposal practices. *Quadion* v. *Mache*, 738 F. Supp. 270, 273–275 (N.D. Ill. 1990).

The claim by Petitioner that the Court of Appeals' decision "is the broadest standard for CERCLA liability adopted by any federal court to date" (Petitioner's Brief at p. 14) is incorrect. The Second and Eighth Circuit decisions upon which Petitioner so heavily relies (Petition at pp. A-14–15) are consistent with and support the Sixth Circuit's decision in this case. Because of the perceptive analysis of these two cases by District Judge Richard A. Enslen in the cases of *Kelley* v. *Thomas Solvent*, 727 F. Supp. 1554 (W.D. Mich. 1989), 727 F. Supp. 1532 (W.D. Mich. 1989); and *Kelley* v.

[5] May 3, 1991 transcript, Livingstone, pp. 77–8. Petitioner's full statement on the point was this: "I would frankly probably dress him [the company president] down for [telling me] that [information about burning wastes] because I don't want to hear about that sort of thing."

ARCO Industries, 723 F. Supp. 1214 (W.D. Mich. 1989), his analysis of these decisions (727 F. Supp. at 1561) is set out below:

> In *United States* v. *Northeastern Pharmaceutical & Chemical Co.* ('NEPACCO'), 810 F.2d 726 (8th Cir. 1986), the president and major shareholder of NEPACCO was held liable as a 'generator' under the Resource Conservation and Recovery Act ('RCRA') despite a finding that *he had no knowledge of the plan to dispose of hazardous waste, nor was he present at the plant during the period of waste disposal.* The Eighth Circuit observed that its 'analysis of the scope of personal liability under the RCRA is similar to our analysis of the scope of individual liability under CERCLA.' *Id.* at 745. The Court reasoned that although the president was *'not personally involved in the actual decision* to transport and dispose of the hazardous substances,' he in fact was 'in charge of and directly responsible for all of NEPACCO's operations . . . and he had the ultimate authority to control the disposal of NEPACCO's hazardous substances.' *Id.* at 744. (Emphasis added by Plaintiffs/Respondents).
>
> In the Second Circuit case, the court held the principal officer and shareholder liable as an operator under § 107 of CERCLA where a close corporation purchased contaminated property, but did not actually dispose of hazardous substances. *New York* v. *Shore Realty*, 759 F.2d 1032 (2d Cir. 1985). As in *NEPACCO*, the *Shore Realty* court found the vital factor to be as follows: the corporate official 'is in charge of the operation of the facility in question, and as such is an 'operator' within the meaning of CERCLA.' *Id.* at 1052.

It was based on these cases that Judge Enslen formulated a test for liability which looked closely at "responsibility . . . neglected," and rewarded "affirmative attempts to prevent unlawful hazardous waste disposal." The test "is different from the issue of personal knowledge, direct supervision, or active participation;" it is in fact a "'prevention' test." It

penalizes those who have eyes, but "chose not to see," and those who, having the power, "avoid getting involved with waste disposal at their facilities." 727 F. Supp. at 1562.

Clearly, Petitioner's actions and inactions are precisely encompassed by this test for liability. Petitioner neglected any responsibility for waste handling, even though he admittedly knew solvents were used in the manufacturing process. See Petitioner's June 29, 1992 Brief to the Court of Appeals at p. 28. His protest at trial that he was "not a chemist"[6] can hardly shield him from responsibility where, obviously, he knew that chemists were necessary to understand and control the potentially dangerous propensity of the solvents used. He avoided getting involved; it was his choice "not to see." The Court of Appeals decision was properly made and should stand.

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[6] May 3, 1991 Transcript, Livingstone, p. 90.

CONCLUSION

Petitioner's Petition must be denied in its entirety.

Respectfully submitted,

DICKINSON, WRIGHT, MOON,
VAN DUSEN & FREEMAN

By: /s/ HERBERT G. SPARROW, III
Counsel of Record

For Plaintiffs/Respondents
RICHARD M. DONAHEY and
PATRICA A. DONAHEY
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226
(313) 223-3500

Dated: October 12, 1993

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD M. DONAHEY and
PATRICIA A. DONAHEY,
Plaintiffs,

vs.

HELEN L. BOGLE, SEABOURN S. LIVINGSTONE, H. GORDON WOOD and ST. CLAIR RUBBER COMPANY, a Michigan Corporation, jointly and severally,
Defendants.

Case No. 87-CV-74771-DT
HON. LAWRENCE P. ZATKOFF

ORDER MODIFYING OCTOBER 1, 1991 FINDINGS OF FACT & CONCLUSIONS OF LAW

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 23rd day of December, 1991.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This matter is before the Court on defendant-Bogle's motion to amend this Court's findings of fact and conclusions of law dated October 1, 1991.

Bogle contends that because the Court found that plaintiff-Donahey's actions at the Will Street site were neither necessary nor consistent with the national contingency plan ("NCP"), the Court should not have found Bogle jointly and severally

liable under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") for the environmental contamination at issue in this case. Bogle also contends that because ownership under CERCLA § 9607(a) is determined at the time the complaint in the suit is filed, plaintiff-Patricia Donahey should be considered a current owner of the Will Street property and, hence, a covered person under CERCLA.

In its findings of fact and conclusions of law, the Court determined that plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. were jointly and severally liable for the environmental contamination of the Will Street property based on their status as "covered persons" under § 9607(a) — despite the fact that the plaintiffs failed to prove all the elements of their prima facie case. The Court was in error. With respect to the environmental contamination at issue in this case, the plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. are merely covered persons under CERCLA. Because the plaintiffs failed to establish all the elements of their claim, no judgment of liability against plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. can enter.

Accordingly, the Court hereby amends its October 1, 1991 findings of fact and conclusions of law such that (1) the Court's previous determination that the plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. are jointly and severally liable is hereby vacated, and (2) the Court finds that plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. are merely covered persons under § 9607(a).

In its findings of fact and conclusions of law, the Court held that although plaintiff-Patricia Donahey owned the Will Street property when the complaint was filed, she relinquished title before trial and was not, therefore, a covered person under CERCLA. The Court rejects Bogle's claim that Patricia Donahey is a covered person under § 9607(a). Bogle

relies on *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550, 1554 (11th Cir. 1990) (current ownership status under § 9607(a) of CERCLA is determined when the complaint is filed). The Court declines to follow *Fleet Factors* for two reasons: first, the court in *Fleet Factors* reached its conclusion with no analysis whatsoever; second, the statute itself does not support the conclusion that "current owner" status is fixed at the moment the complaint is filed.

Bogle's remaining arguments in support of modification are rejected.

IT IS SO ORDERED.

/s/ LAWRENCE P. ZATKOFF
Lawrence P. Zatkoff
United States District Judge

Pursuant to Rule 77(d), FrCivP, copies have been mailed to the following:

/s/ ATTY. CHARLES G. KELLY
Atty. Charles G. Kelly

/s/ ATTY. JAY E. BRANT
Atty. Jay E. Brant

/s/ ATTY. HERBERT G. SPARROW
Atty. Herbert G. Sparrow

/s/ ATTY. HENRY N. CARNABY
Atty. Henry N. Carnaby

/s/ ATTY. C. BARRY WETHERINGTON
Atty. C. Barry Wetherington
on Dec. 23, 1991

/s/ R.P. NASTWOLD
R.P. Nastwold

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD M. DONAHEY and
PATRICIA A. DONAHEY,
Plaintiffs and
Counter-Defendants,

vs.

HELEN L. BOGLE,
Defendant and
Counter-Plaintiff,

and

SEABOURN S. LIVINGSTONE,
H. GORDON WOOD and
ST. CLAIR RUBBER COMPANY,
a Michigan Corporation,
jointly and severally,
Defendants.

Case No. 87-CV-74771-DT
HON. LAWRENCE P. ZATKOFF

JUDGMENT

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 23rd day of December, 1991.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

The Court has made and filed its Findings of Fact and Conclusions of Law in this case on October 1, 1991, as modified by this Court's December 23, 1991 Order, as summarized below:

(1) Plaintiff-Richard M. Donahey, defendant-Helen L. Bogle, and defendant-St. Clair Rubber Company, a Michigan corporation, are covered persons under the Com-

prehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, for the environmental contamination at issue in this case and discussed in this Court's October 1, 1991 Findings of Fact and Conclusions of Law;

(2) with respect to the above referenced environmental contamination, neither plaintiff-Patricia Donahey nor defendant-Seabourn S. Livingstone are covered persons under CERCLA;

(3) none of the parties has incurred any recoverable response costs under CERCLA;

(4) plaintiffs' request for declaratory relief for future liability pursuant to 42 U.S.C. § 9613(g)(2) is denied;

(5) Richard M. Donahey is the current owner of the Property at 2408 Will Street, and Helen L. Bogle holds legal title merely to secure the indebtedness of Richard M. Donahey to her pursuant to a land contract entered into between the parties ("the land contract");

(6) Richard M. Donahey shall specifically perform the land contract within 10 days of the entry of this judgment by paying (1) $69,496.49 being the principal amount due as of June 8, 1987 when Richard M. Donahey made his last payment under the land contract to Helen L. Bogle, together with (2) interest on payments due pursuant to the land contract calculated in accordance with the land contract rate of 11% per annum, running from June 8, 1987 until March 14, 1989 being the date of filing of Helen L. Bogle's Counterclaim, together with (3) pre-judgment interest pursuant to M.C.L. 600.6013(5) from March 14, 1989 to the date of this Judgment, together with (4) Judgment interest thereafter pursuant to 28 U.S.C. § 1961 from the date of this Judgment until the date of payment;

and hereby ORDERS, ADJUDGES and DECREES that

(A) with respect to Richard and Patricia Donaheys' CERCLA claims, Judgment of No Cause for Action and No Cause for Declaratory Relief including declaratory relief for future liability, is granted in favor of St. Clair Rubber Company, Helen L. Bogle, and Seabourn S. Livingstone against Richard M. and Patricia A. Donahey; and

(B) with respect to Helen Bogle's counterclaim under CERCLA, Judgment of No Cause for Action is granted in favor of St. Clair Rubber, Seabourn S. Livingstone, Richard Donahey and Patricia A. Donahey against Helen L. Bogle; and

(C) with respect to Helen Bogle's counterclaim for breach of contract under Michigan Common Law, Judgment in the amount stated above is granted in favor of Helen L. Bogle against Richard M. Donahey, together with interest; and

(D) with respect to Helen Bogle's counterclaim for specific performance under Michigan Common Law, Judgment for specific performance is granted in favor of Helen L. Bogle against Richard M. Donahey, by which Richard M. Donahey is ORDERED to accept title to the property, 2408 Wills, Marysville, St. Clair County, Michigan, as and when presented and, upon failure of Richard Donahey to accept title, Helen L. Bogle is granted the right to present this JUDGMENT as Deed of Ownership of Richard M. Donahey to the property, and State of Michigan, County of St. Clair and City of Marysville officials are directed to recognize this JUDGMENT as Deed, according it all rights and privileges, including recordation.

IT IS SO ORDERED.

/s/ LAWRENCE P. ZATKOFF
Lawrence P. Zatkoff
United States District Judge

Pursuant to Rule 77(d), FrCivP, copies have been mailed to the following:

/s/ ATTY. JAY E. BRANT
Atty. Jay E. Brant

/s/ ATTY. HERBERT G. SPARROW
Atty. Herbert G. Sparrow

/s/ ATTY. HENRY N. CARNABY
Atty. Henry N. Carnaby

/s/ ATTY. C. BARRY WETHERINGTON
Atty. C. Barry Wetherington

/s/ ATTY. CHARLES G. KELLY
Atty. Charles G. Kelly

on Dec. 23, 1991

/s/ R.P. NASTWOLD
R.P. Nastwold